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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,

Petitioner,

v.

BRENTWOOD ACADEMY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Respondent Brentwood Academy.[1] The Institute is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas.

The Institute litigates First Amendment cases throughout the country and files amicus curiae briefs in cases on behalf of individuals whose right to speak and associate has been infringed by the actions of the government, including *Randall v. Sorrell*, __ U.S. __, 126 S. Ct. 2479 (2006), *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006), and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). The Institute also represents beneficiaries of school choice programs and represented a group of Petitioners in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding Cleveland school voucher program) and the Petitioners in *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 661 (2006). The Institute believes that its legal perspective and experience will provide additional considerations regarding this issue that are not contained in the briefs of the parties.

INTRODUCTION

The Tennessee Secondary School Athletic Association ("TSSAA") enacted a rule that banned schools from exerting "undue influence . . . to secure or to retain a student for athletic purposes." ("Recruiting Rule"), Joint Appendix ("JA") 181 (Feb. 20, 2007). TSSAA formally interpreted the Recruiting Rule to forbid "any initial contact or prearranged contact by a member

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1. Pursuant to Rule 37.1 of the Rules of the Supreme Court of the United States, Amicus states that no counsel for any party to this case authored this brief in whole or in part, and no person or entity other than Amicus made any monetary contribution to the preparation or submission of this brief. Amicus has sought and received consent from counsel to both parties to submit this brief.

of a coaching staff or representative of the school and a prospective student/athlete." JA 182. The Brentwood Academy ("Brentwood") football coach contacted all eighth grade boys who had chosen to enroll in Brentwood for the following school year, inviting them to observe a spring football practice. JA 119, 219-20. TSSAA ultimately decreed that Brentwood had violated the Recruiting Rule and imposed a substantial sanction. JA 243.

This Court's First Amendment jurisprudence has proceeded, for some time, down a troubling path of sorting speech into narrow subcategories. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In addition to producing unnecessary doctrinal complexities, this approach has inevitably led to *less* protection for core speech. Seeking to further expand this compartmentalized approach, Petitioner alternatively asks this Court to relegate Brentwood's speech to the standard of review applicable to government employees, participants in government-funded programs, or recipients of government benefits—essentially any standard that enables TSSAA to obtain deference. Brief for Petitioner 20-21, 23, 27, 32 (Feb. 20, 2007) ("Pet'r Br.").

The district court and court of appeals, for different reasons, properly found that the Recruiting Rule infringed Brentwood's First Amendment right to free speech. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998), *aff'd on other grounds*, 442 F.3d 410 (6th Cir. 2006). That is, although the two courts differed as to whether the Recruiting Rule was content-neutral or content-based—and therefore as to the applicable level of scrutiny—there was unanimity on the central question before this Court: whether TSSAA can avoid the rigors of First Amendment scrutiny altogether. Amicus strongly believes that this Court should firmly reject TSSAA's attempt to displace traditional First Amendment review by analogizing to existing exceptions or,

as the United States suggests, by creating a new "voluntary association" exception.

That Petitioner is leery of traditional First Amendment scrutiny is not surprising. The Recruiting Rule is a naked content-based restriction on speech. *See United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). The Recruiting Rule is completely indifferent to the time, place, or manner of communication between secondary schools and prospective students (and their parents). TSSAA has enacted a rule that targets certain speech—*i.e.*, speech associated with athletics—for disfavored treatment. There simply is nothing "neutral" about the Recruiting Rule.

Petitioner's retreat to the more deferential standards of review noted above misses the mark. The test articulated in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), applies only to the government's ability to regulate the speech of its employees, while the standard articulated in *Rust v. Sullivan*, 500 U.S. 173 (1991), applies to those who participate in government-funded spending programs. Each of these deferential standards was crafted to fit unique circumstances entirely dissimilar to the present case. As this Court already has determined, TSSAA exercises the governmental authority of the State of Tennessee in overseeing state-sanctioned interscholastic athletics. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001). Private citizens do not lose their First Amendment rights by acknowledging the authority of a State licensing or regulatory board such as TSSAA. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994).

Last, TSSAA's desire to cast the Recruiting Rule as the only means available for vindicating the legitimate interest in preventing schools from exercising "undue influence" over potential students lacks any basis in fact or law. In championing this dubious proposition, TSSAA fails to account for the impact the Recruiting Rule will have on speakers and listeners. The

rule not only blocks the free flow of information, an important First Amendment value, but also violates Brentwood's ability to reach its intended audience and the recipient's interest in receiving this truthful message. *See Martin v. Struthers*, 319 U.S. 141 (1943). It thus shuts down an important—and in some cases the only—avenue of communication between schools and prospective students and their parents.

In so doing, the Recruiting Rule undermines informed educational choice. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Preventing informed educational choice, unfortunately, may well be Recruiting Rule's animating principle. As TSSAA's reliance on "competitive equity" reveals, the Recruiting Rule appears to reflect an interest in subordinating the State's educational mission to the interest of the public school establishment in greater athletic parity—*i.e.*, ensuring that public school athletic teams fare better on the playing field by retaining better athletes—whether it is in the students' long-term interest or not. Competitive equity thus not only forces students to stay in schools that have failed them, but also runs counter to the educational mission of the State. The judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. TSSAA'S REGULATION OF FREE SPEECH IS SUBJECT TO EXACTING SCRUTINY UNDER THE FIRST AMENDMENT.

A. The Court Should Reject Any Attempt to Further Erode First Amendment Scrutiny.

Petitioner asks this Court to pigeonhole Brentwood's truthful speech into one deferential First Amendment standard or another. To that end, Petitioner and supporting amici offer the Court a menu of options—other than exacting review—to shield the Recruiting Rule from any serious examination. This Court should reject Petitioner's invitation to invent new subcategories of speech and relegate them to less than full First Amendment protection. *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[A] State cannot foreclose the exercise of constitutional

rights by mere labels."); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981) ("[D]emocracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgments in this area.").

Freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937); *see also Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("[P]referred place [is] given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."). The Framers, "[b]elieving in the power of reason as applied through public discussion, . . . eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Indeed, "[t]here is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties . . . . The durability of our system of self-government hinges upon the preservation of these freedoms." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381-82 (1973). In many ways, the entire enterprise of judicial characterization and ranking of various types of speech is inconsistent with the marketplace-of-ideas theory behind the First Amendment. Value should be assigned by the collective body of listeners, not by any branch of state or federal government. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.").

Over time, however, this Court's jurisprudence has moved toward this compartmentalized approach to government restrictions on free speech. *See, e.g., United States v. O'Brien*, 391 U.S. 367 (1968) (content-neutral regulations); *Miller v. California*, 413 U.S. 15 (1973) (lower-value speech); *Cent. Hudson Gas. & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (commercial speech); *FCC v. League of Women*

Voters of California, 468 U.S. 364 (1984) (unconstitutional conditions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (government speech); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968) (public employment); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (government as educator); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (government as proprietor); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (public airwaves); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (compelled speech).

Categorizing speech into hierarchical categories inevitably increases the danger that speech as a whole will not receive the robust protection the First Amendment was adopted to guarantee. *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1209 (9th Cir. 1996) ("Although we must look to the most appropriate precedent and doctrine, we are also aware of the dangers of reducing the First Amendment to a series of doctrinal cubbyholes and of warping different fact situations to fit into the boxes we have created."); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 504 (1997) (Thomas, J., dissenting) ("I continue to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally."). Indeed, classifying speech into these narrow categories generally has led to *less* protection for private speech. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 322 (1998) ("Intermediate scrutiny is not a deeply principled, highly theorized response to problems of constitutional law. It is instead a compromise position that lies between two more-or-less theorized and principled poles."); *cf. Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting) ("[T]he phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough.").

Petitioner and amici seek to exploit the uncertainties inherent in this compartmentalized approach by advancing a scattershot of theories why Brentwood is not entitled to the full protection of the First Amendment. Pet'r Br. 20-21, 23, 27, 32 (arguing alternatively for the applicability of unconstitutional conditions, public employment, educational, and government-funded speech standards of First Amendment review). Worse still, Petitioner and its amici do not even settle on a particular category of lesser-protected speech, thus underscoring the doctrinal confusion engendered by the very hierarchy-of-speech framework they advocate. This unwillingness to settle on any existing First Amendment paradigm reflects a greater interest in obtaining a deferential standard of review than in a sincere examination of the true nature of TSSAA's ban on speech. Brief for the United States as Amicus Curiae Supporting Petitioner 10 (Feb. 20, 2007) ("No precedent of this Court directly addresses the degree of scrutiny to which restrictions on speech should be subjected in this precise context. Established First Amendment principles point to the conclusion, however, that the restrictions should be reviewed deferentially.").

The Court should reject Petitioner's invitation to expand or contort existing categories of lesser-protected speech to fit the needs of the Recruiting Rule. The right to speak freely should not be dependent on the ability to navigate around an ever-expanding list of exceptions to the general protections of the First Amendment. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 128 (1991) (Kennedy, J., concurring) ("The case before us presents the opportunity to adhere to a surer test for content-based cases and to avoid using an unnecessary formulation, one with the capacity to weaken central protections of the First Amendment."). Truthful speech about athletic and educational opportunities at private schools is in the heartland of what the First Amendment was designed to protect. If the State can muzzle a private academy to "protect" state-run schools from the persuasive

power of that speech, then the State can completely shut down the marketplace of ideas in the entire area of educational choice.

B. TSSAA's Recruiting Rule Is a Content-Based Restriction on Speech.

TSSAA's Recruiting Rule is a content-based speech restriction subject to the most exacting First Amendment scrutiny. The Recruiting Rule provides that "[t]he use of undue influence on a student . . . , his or her parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998). TSSAA has interpreted this rule as prohibiting school-initiated contact of any kind on the subject of athletics and as only allowing discussions with prospective students on the subject of athletics "at the request of the family." *Id.* at 674. This rule self-evidently favors certain speech, at the expense of other speech, because of its content. *Id.* at 688 ("The Court finds that the Recruiting Rule ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener.").

The Constitution abhors content-based restrictions on speech. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (reiterating that "government may not regulate speech based on its substantive content or the message it conveys"); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (explaining that the law applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

Content-based restrictions on speech are disfavored for a reason. "Our political system and cultural life rest upon" the

idea that individual citizens can judge for themselves what "ideas and beliefs [are] deserving of expression, consideration, and adherence." *Turner Broad.*, 512 U.S. at 641. Government cannot be allowed to manipulate the range of information available to the public. *See Simon & Schuster*, 502 U.S. at 116 (explaining that content-based restrictions "raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *Turner Broad.*, 512 U.S. at 641 (content-based restrictions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion").

Here, the content-based nature of the Recruiting Rule is readily apparent. TSSAA, a government actor, has determined that it is wise to drive certain ideas—specifically ideas designed to inform students about educational and athletic opportunities—from the marketplace. TSSAA admits as much: in the district court, TSSAA stated that its aim was to prevent schools from treating student-athletes and non-student-athletes differently and to deter them from unduly influencing student-athletes. *Brentwood*, 13 F. Supp. 2d at 688. Such restrictions are based only on the words and message being conveyed, not the time, place, manner, or any other incidental characteristic of their utterance. By its plain terms, the Recruiting Rule applies only to speech designed to "secure or to retain a student for athletic purposes." JA 181; *see Brentwood*, 13 F. Supp. 2d at 688 ("[T]he ban was purportedly enacted to prevent student-athletes from being subjected to the content of the message being conveyed by public and private school representatives outside the student's feeder pattern. TSSAA's purpose in enacting the ban, then, indicates that the ban is not content-neutral.").

Examining a situation in which TSSAA would *not* have enforced the Recruiting Rule confirms the content-based nature of this restriction. If the Brentwood football coach, for example, had sent a letter or had telephoned all male students that had signed enrollment contracts, identified himself, and simply

stated, "We look forward to having you as a student at Brentwood next year," TSSAA would not have taken any disciplinary action. As Ronnie Carter, Executive Director of TSSAA, testified, TSSAA doesn't "have a no coach contact rule." JA 428. Yet the time, place and manner of the above hypothetical communication are identical to those at issue here—all that differs is the content of the communication.

The district court therefore correctly found that "the substantive 'content' of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 304 F. Supp. 2d 981, 991 n.4 (M.D. Tenn. 2003). This is the essence of a content-based regulation of speech. *United States v. Playboy Entm't Group*, 529 U.S. 803, 811 (2000) (explaining that where "[t]he speech in question is defined by its content . . . the statute which seeks to restrict it is content based"); *Carey v. Brown*, 447 U.S. 455 (1980) (striking down restriction where "permissibility of residential picketing . . . depende[d] solely on the nature of the message being conveyed").

While it ultimately rendered the correct judgment, the Sixth Circuit, likening the Recruiting Rule to a zoning regulation, mistakenly classified it as a content-neutral restriction of speech because, in the court's view, "prohibiting coaches from initiating contact with students or their parents prior to enrollment in the school is a limitation on the manner in which secondary schools can communicate with students about their athletic programs." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 262 F.3d 543, 552 (6th Cir. 2001). The Sixth Circuit erred for at least three reasons.

First, the Recruiting Rule does not simply limit the "manner" in which Brentwood could contact prospective students. Rather, it forbids the school from initiating communication with a prospective student with respect to an entire topic—*viz.*, athletics. *Brentwood*, 13 F. Supp. 2d at 673.

The rule, for example, does not limit the hours in which a school may make phone calls or limit initial contact to written communication or require that such contact occur after school hours, all of which would be ways in which a Recruiting Rule could target the time, place or manner in which a message is being communicated rather than the message itself. Instead, all discussion initiated by the school on the subject of athletics is prohibited, no matter when, where, or how conveyed. *Cf. Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("Article VIII is not a procedural regulation. It does not regulate the time of elections; it does not regulate the place of elections; nor, we believe, does it regulate the manner of elections.").

Hence, even if the Recruiting Rule is viewpoint-neutral, it certainly targets speech based on its content. As this Court has explained, "a regulation that does not favor either side of a political controversy is nonetheless impermissible because the First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quotation and citation omitted) (omission in original); *see also Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) ("Arkansas' system of selective taxation does not evade the strictures of the First Amendment merely because it does not burden the expression of particular *views* by specific magazines."); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (defining "'content-neutral' speech regulations as those that are *justified* without reference to the content of the regulated speech" (internal citations and quotations omitted)). "[A] content-based blanket restriction on speech . . . cannot be properly analyzed as a form of time, place, and manner regulation." *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (citations and quotations omitted).

Second, the Sixth Circuit erroneously supported its conclusion of content-neutrality by finding that Brentwood retained other means of communicating the availability of educational options to students. *Brentwood*, 262 F.3d at 552 (finding that "prohibiting coaches from initiating contact with

students or their parents prior to enrollment in the school . . . does not mean . . . that Brentwood has no other outlet for providing such information to prospective students, or that middle school students have no way of finding out this information"). This approach is entirely backwards; the availability of alternative avenues is relevant only after a court has already determined that the regulation is content-neutral—not before. *See Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980) (explaining that the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression"); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is.").[2]

Third, the lower court's theory that the Recruiting Rule is subject to intermediate scrutiny because it primarily regulates conduct and the secondary effects of speech must fail. *Brentwood*, 262 F.3d at 553. The Recruiting Rule focuses on the effects of the protected speech on the listener—not the community writ large. *Brentwood*, 13 F. Supp. 2d at 688. The right to regulate the secondary effects of speech cannot be based on the impact of the proscribed category of speech on the audience, *Boos*, 485 U.S. at 321 ("Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*."), or other primary effects of the targeted speech, *Playboy*, 529 U.S. at 815 ("We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or

2. The Sixth Circuit's conclusion that the Recruiting Rule does not effect a total ban also is immaterial. *See Playboy Entm't Group*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

declining property values has no application to content-based regulations targeting the primary effects of protected speech."). Because the Recruiting Rule "focuses *only* on the content of the speech and the direct impact that speech has on its listeners," it "is the essence of content-based regulation." *Id.* at 811-12 (internal quotation and citation omitted). The Recruiting Rule should be analyzed under the most demanding scrutiny available under the First Amendment.

II. TSSAA'S REGULATION DOES NOT QUALIFY FOR ANY SPECIAL EXCEPTION TO STRICT FIRST AMENDMENT SCRUTINY.

A. TSSAA Exercises the Sovereign Regulatory Authority of the State of Tennessee.

TSSAA, like any other official regulatory or licensing board, oversees interscholastic athletics in Tennessee pursuant to the sovereign authority of the State. This conclusion is the necessary result of the Court's determination that TSSAA is a state actor. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001). In that decision, this Court explained that TSSAA is a "statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools," *id.* at 290, and is engaged in "regulatory activity," *id.* at 291. This Court could not have been more clear: TSSAA "has historically been seen to regulate in lieu of the State Board of Education's exercise of its own authority." *Id.*

The factual record also evidences TSSAA's regulatory status. TSSAA's constitution recognizes its plenary authority over all athletic competition in Tennessee, stating that its organizational purpose is "to stimulate and regulate the athletic relations of the secondary schools of Tennessee." JA 134. Indeed, Petitioner and supporting amici repeatedly reference the indispensable role interscholastic athletics play in a well-rounded secondary education. *See* Pet'r Br. 3 (stating that TSSAA is organized to "promote the educational ideals of interscholastic athletics"); JA 134 ("The athletic field and the gymnasium are classrooms in which teaching is foremost in the development

of character, integrity, sportsmanship, and teamwork. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other."). This Court has taken TSSAA at its word. *See Brentwood*, 531 U.S. at 300 (explaining that athletics "provide an integral element of secondary public schooling").[3]

TSSAA thus is *not*, as Petitioner suggests, "a voluntary membership organization through which members self-regulate their sports competition and establish common rules to promote the educational ideals of interscholastic athletics." Pet'r Br. 3. That battle has already been lost. *Brentwood*, 531 U.S. at 291 ("We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way."). TSSAA, as the governing body for Tennessee athletic competition, licenses and regulates all schools that wish to participate in state-sanctioned interscholastic athletics. *See, e.g.*, JA 201 ("The sports season for a school shall end when the team has been eliminated from the TSSAA tournament series or has won the state championship.").

Indeed, TSSAA's monopoly over the governance of state-sanctioned interscholastic athletic competition in Tennessee confirms the pervasiveness of its oversight authority. *See Brentwood* 304 F. Supp. 2d at 997 ("TSSAA is effectively the only game in town."). Because "[a] member school's team may play or scrimmage only against the team of another member, absent a dispensation" and "without any other authority actually regulating interscholastic athletics," *Brentwood*, 531 U.S. at 291,

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3. *See also* Brief of Amicus Curiae of National Federation of State High School Associations in Support of Petitioner 3 (Feb. 20, 2007) ("NFHS views cocurricular activities, including athletics, as an integral part of the high school experience."); *id.* at 4 ("[A]thletics are an extension of the classroom."); TENN. BD. OF EDUC. RULE 0520-1-2-.08(1) (recognizing "the value of participation in interscholastic athletics").

schools are essentially forced to join TSSAA to offer their students the opportunity to participate in interscholastic athletics, *id.* at 299 (explaining that "a pickup system of interscholastic games would not do"). Joining TSSAA is the only means for Brentwood and other secondary schools to offer their students the unique educational experience that comes from participation in interscholastic athletic competition.

Private citizens do not waive their First Amendment rights by voluntarily engaging in an activity that is licensed or regulated by the State. *See Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (employing traditional First Amendment analysis to attorney disciplinary rules that arise only by virtue of their licensure); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504-505 (1996) (applying commercial speech doctrine to liquor licensing statute); *Va. State Bd. of Pharmacy*, 425 U.S. at 749-50, 762-70 (determining that commercial speech doctrine applies to advertising rule applicable to licensed pharmacists as a condition of their licensure); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (applying commercial speech doctrine to ban on certain speech applicable only to licensed CPAs). Indeed, if it were otherwise, the State could vitiate First Amendment protection in any area by adopting an exclusive licensure or membership requirement and then claim a surrender of First Amendment rights due to "voluntary" participation. *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64 (1988).

In *Ibanez*, for example, an accountant and attorney who voluntarily submitted herself to the regulatory jurisdiction of the relevant state agency was nonetheless entitled to the full protection of the First Amendment. 512 U.S. at 139 & n.3. The Court, employing the traditional First Amendment analysis, held "that the Board's decision censuring Ibanez is incompatible with First Amendment restraints on official action." *Id.* at 139. The import of *Ibanez* and other similar cases is unmistakable: "voluntary association" with the regulatory authority of the State

is not by itself sufficient to remove the case from traditional First Amendment scrutiny. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). Those involved in private enterprise always have the choice not to engage in a particular profession or activity for which a license is needed. But this Court has always employed its traditional First Amendment analysis where the maintenance of the license is in some way conditioned on the sacrifice of First Amendment rights. *See, e.g., City of Lakewood*, 486 U.S. at 763-64. This case is no different; TSSAA in effect grants its member schools a license to participate in statewide interscholastic athletics and cannot avoid the strictures of the First Amendment under a newly minted "voluntary association" standard.

B. This Is Not a Public Employment Case.

Petitioner counters that this case is subject to the test set forth in *Pickering*, 391 U.S. 563. Pet'r Br. 27-32. TSSAA misapprehends this entire line of cases. *Pickering*, and its progeny, *Connick v. Myers*, 461 U.S. 138 (1983), and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), apply only to government employment relationships.

In *Pickering*, this Court addressed the extent to which public employees retain their First Amendment rights. In resolving this question, the Court crafted a balance between the rights of the employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, *as an employer*, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568 (emphasis added). The Court made clear that this balancing approach was legitimate only because the interests of the State as an employer are different in kind from its interests in any other context: "[T]he State has interests *as an employer* in regulating the speech *of its employees* that *differ significantly* from those it possesses in connection with regulation of the speech *of the citizenry in general*." *Id.* (emphasis added); *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (explaining that "constitutional review of *government employment decisions* . . . rest on different principles

than review of speech restraints imposed by *the government as sovereign*" (emphases added)).

Connick and *Umbehr* confirm this understanding. In *Connick*, the Court explained that the *Pickering* balancing test "reflects both the historical evolvement of the rights of public employees, and the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick*, 461 U.S. at 143. Accordingly, "when a public employee speaks not as a citizen upon matters of public concern, but speaks instead as an employee upon matters only of personal interest," the First Amendment is not grounds for review of the employment decision. *Id.* at 147. *Umbehr* merely extended the *Pickering* balancing test to independent contractors because of the similarity of functions they and full-time employees perform for the government. *Umbehr*, 518 U.S. at 678 ("We . . . see no reason to believe that proper application of the *Pickering* balancing test cannot accommodate the differences between employees and independent contractors.").

Instead of respecting the natural limits of *Pickering*, Petitioner contorts the Court's reference in *Umbehr* to the government's "contractual power," in forming the employment relationship at issue, to expand the *Pickering* balancing test to entirely dissimilar circumstances. That is, Petitioner's contention that the Court's use of the phrase "contractual power" extends *Pickering*'s balancing test far beyond the employment context, Pet'r Br. 27-28, cannot be correct. Were the Court to expand *Pickering* in such a dramatic way, it would doubtless have made its intention to do so—and thus its intention to trench further on protected speech—far more clear. Instead of the expansive meaning Petitioner proposes, the Court was simply explaining its minor extension of *Pickering* to the independent contractor context. For this reason, this Court has never applied *Pickering* or *Umbehr* outside the employment context. *See, e.g., O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 713 (1996);

L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 43 (1999); *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

And *Pickering* certainly does not apply in the circumstances presented here. *See Waters*, 511 U.S. at 674-75 ("[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible."). Neither Brentwood nor its employees have been hired by TSSAA to do anything.[4] If *Pickering* now extends to all who voluntarily participate in any government program, the vast majority of the country's population has just suffered a massive diminution in First Amendment rights.

C. Brentwood Is Not Participating in a Government-Funded Program.

Contrary to Petitioner's alternative argument, Pet'r Br. 22-27, this case also bears no relation to the government programs addressed by this Court in *Rust* and *United States v. American Library Association*, 539 U.S. 194 (2003). In both cases, the Court confronted First Amendment challenges to government-funded spending programs. In *Rust*, the plaintiffs challenged a federal funding provision that forbade the use of appropriated funds "in programs where abortion is a method of family planning." 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6). In *American Library Association*, the Court addressed a similar challenge to a federal law that denied funds to any public library that refused to install Internet filtering software. 539 U.S. at 201-202.

4. Were *Pickering* to apply here, it thus would create the anomalous circumstance wherein employees of TSSAA, such as its Executive Director and staff, would have the same First Amendment rights of free speech as schools such as Brentwood. This understanding would completely remove *Pickering* from the employment context and would allow a licensing body, such as TSSAA, to regulate the speech of employees of its regulated entities (and speech of the regulated entity itself) in any number of circumstances. *Pickering* was never intended to have such far-reaching consequences.

The Court rejected both challenges because "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a penalty on that activity." *Id.* at 212 (quoting *Rust*, 500 U.S. at 193 (internal quotations and citations omitted)). As the Court explained, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194; *Am. Library Ass'n*, 539 U.S. at 203 ("Congress has wide latitude to attach conditions to the receipt of federal assistance on order to further its policy objectives." (citation omitted)). Thus, Congress was "not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Am. Library Ass'n*, 539 U.S. at 211 (quoting *Rust*, 500 U.S. at 196). *Rust* and *American Library Association* stand for the relatively modest proposition that government does not violate the First Amendment when it appropriates funds for a specific purpose.

That rule has no application here. TSSAA is not a government program in the sense that was significant in *Rust* and *American Library Association*. It does not expend government funds, *see Rust*, 500 U.S. at 196, it does not serve as a proprietor of public land, *see United States v. Kokinda*, 497 U.S. 720, 725 (1990), and it does not distribute a public benefit, *see Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545 (1983). TSSAA, like any other government regulatory or licensing authority, is charged with regulating private conduct—nothing more.

Moreover, this Court made clear that the funding restrictions at issue in those cases were not used as a means of suppressing speech—they were just a refusal by government to fund it. *See Rust*, 500 U.S. at 198 ("Congress has . . . not denied . . . the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc . . . ."); *Regan*, 461 U.S. at 545 ("The Code does not deny TWR the right to receive deductible contributions to support its nonlobbying activity, nor does it deny TWR any independent

benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies."). Here, however, Brentwood is not asking the State of Tennessee to fund its speech; it is simply asking that private speech not be suppressed by the State. The distinction is important. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001) ("Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

Indeed, even the government's use of funding provisions to suppress private speech has been routinely struck down. *See, e.g.*, *League of Women Voters*, 468 U.S. at 400 (invalidating federal law on First Amendment grounds where "a noncommercial educational station that receives only 1% of its overall income from CPB grants [was] barred absolutely from all editorializing" because "such a station [was] not able to segregate its activities according to the source of its funding" and "it [was] barred from using even wholly private funds to finance its editorial activity"); *Velazquez*, 531 U.S. at 548 ("[I]n the context of this statute there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives.").

In short, the State "cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez*, 531 U.S. at 547. TSSAA fails to heed this admonition. The State of Tennessee, through TSSAA, has not appropriated funds to advance a programmatic speech-related interest. *Rust* and *American Library Association* therefore are inapplicable. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410, 423 (6th Cir. 2006) ("[T]he TSSAA's enforcement of the Recruiting Rule is not a funding program. Nor does it represent government speech. Cases like *Rust* do not govern the present case.").

III. TSSAA'S ATTEMPT TO JUSTIFY ITS SPEECH RESTRICTION FALLS SHORT UNDER ANY STANDARD.

A. TSSAA Gave No Weight to the Impact of the Recruiting Rule on Speakers and Listeners.

Aside from the content-based infirmities discussed above, the Recruiting Rule conflicts with at least two important First Amendment principles. First, it interferes with the "free flow of ideas"—a core First Amendment value. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 252 (1974); *see 44 Liquormart*, 517 U.S. at 512 ("The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) ("The preservation of a full and free flow of information to the general public has long been recognized as a core objective of the First Amendment to the Constitution."). Indeed, the First Amendment squarely prohibits overbroad restrictions on truthful speech. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . .").

Speech regulations therefore must be careful to "leave open ample alternative channels for communication of the information" and should not "unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining that even content-neutral restrictions must "leave open ample alternative channels for communication of the information" (quotation omitted)). And, when the Court is "not persuaded that adequate substitutes exist for the important medium of speech that [the regulator of speech] has closed off," such regulations are struck down as unconstitutional. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

Here, as noted above, the Recruiting Rule forbids a coach "from contact[ing] a student or his or her parents prior to his enrollment in the school" and prohibits "[a]ny initial contact or prearranged contact by a member of the coaching staff or representative of the school and a prospective student/athlete." JA 181-82. It further provides that "[p]rivate or parochial schools may not contact students enrolled at the public schools."[5] JA 183. The Recruiting Rule, under TSSAA's official interpretation, ultimately forecloses *all* means of direct communication between private schools and parents interested in learning more about these alternative educational opportunities. For student-athletes and their families, outreach from a member of the coaching staff, administrator, or teacher at a private school is the natural avenue of communication for learning about educational opportunities at private schools. Indeed, it is perhaps the best or only opportunity to win their attention in many cases.

That students and their families might possibly obtain this message by seeking out private schools and asking them about their message does not save this prohibition from running afoul of the First Amendment. "[T]he First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Hill v. Colorado*, 530 U.S. 703, 728 (2000) (citations and quotations omitted). The Recruiting Rule thus fails to give private schools an adequate opportunity to win the attention of potentially interested students and their families, *see Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (explaining that an alternative means

5. In this litigation, TSSAA has taken the position that the Recruiting Rule only proscribes initial contact by a school representative *on the subject of athletics*. *See* JA 428. TSSAA's official commentary to the Recruiting Rule, however, makes clear that it is capable of a far broader application. *See* JA 181-85. Brentwood's First Amendment rights should not depend on TSSAA's temporary decision to enforce the Recruiting Rule, in the context of ongoing litigation, more judiciously than the official commentary indicates it will in the future.

of communication is constitutionally inadequate if the speaker's "ability to communicate effectively is threatened"), and imposes too great a cost on speech, *see Turner Broad.*, 512 U.S. at 663 ("[A]ssuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.").

Second, TSSAA's Recruiting Rule violates the speech rights of students and their families. The First Amendment affords equal protection to the rights of the willing audience to receive the message. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[I]n a variety of contexts the Constitution protects the right to receive information and ideas."). The First Amendment protects all aspects of speech, as both a speaker and listener are required for a message to be delivered. *Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech . . . embraces the right to distribute literature, and necessarily protects the right to receive it." (internal citation omitted)); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 ("[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."). Here, the Recruiting Rule would deprive students and their families of their right to receive valuable information about educational alternatives. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

B. TSSAA's Recruiting Rule Undermines Informed Educational Choice.

The Recruiting Rule fails to take into account the paramount constitutional interest in affording parents the opportunity to make informed choices about educational alternatives for their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty

interests recognized by this Court."); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children . . . ." (citations omitted)); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."). For this right to have meaning, it must be exercised through informed choice.

Here, by impairing the free flow of education-related information, the Recruiting Rule inhibits parental autonomy. In particular, forbidding private schools from directly contacting public school students and their families limits the opportunity of parents to learn about the full range of educational options available to them and to select the one that best meets the students' needs. As such, the Recruiting Rule "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

Apart from protecting parental liberty, informed school choice is an important government interest in its own right. It allows parents to consider the best options for fulfilling the unique educational needs of their children, including the many potential benefits of educational alternatives such as charter and private schools.[6] As two experts testified in this case, "the flow

6. Private schools generally produce better academic performance than public schools, particularly for minority students. *See, e.g.*, Jay P. Greene, Education Myths 150-54 (2005) (summarizing random-assignment studies of voucher programs in Milwaukee, Charlotte, Dayton, New York City, and Washington D.C.); Paul E. Peterson & Elena Llaudet, Harvard University Kennedy School of Government, *On the Public-Private School Achievement Debate* (Aug. 2006), *available at* http://www.ksg.harvard.edu/PEPG/PDF/Papers/PEPG06-02-PetersonLlaudet.pdf; U.S. Department of Education, Institute of (Cont'd)

of information from schools to parents, as decision-makers, is very important to making informed school choices about both where to attend and the options available at the school that is ultimately selected." *Brentwood*, 304 F. Supp. 2d at 989. Based on this expert testimony, the district court correctly found that informed school choice is a substantial governmental interest. *Id.* at 994. Ensuring informed school choice also is instrumental in promoting other important governmental interests, such as racial integration through voluntary means.[7] By preventing private schools from directly contacting public school students and their families, the Recruiting Rule impairs the ability of

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Education Sciences, *The Nation's Report Card: Student Achievement in Private Schools* 1, 7-9 (2005), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2006459.pdf. Private schools have higher graduation rates than public schools, *see, e.g.*, Jay P. Greene, Manhattan Institute for Policy Research, *Graduation Rates for Choice and Public School Students in Milwaukee* 1, 5, 7 (2004), *available at* http://www.allianceforschoolchoice.org/_docs/grad_rates_milwaukee.pdf, and generally have higher parental satisfaction and parental involvement than public schools, *see, e.g.*, U.S. Department of Education, Institute of Education Sciences, *Trends in the Use of School Choice 1993 to 2003* 6-7 (2006), *available at* http://nces.ed. gov/pubs2007/2007045.pdf. Studies show other benefits as well. *See, e.g.*, William G. Howell & Paul E. Peterson, *The Education Gap: Vouchers and Urban Schools* 185 (rev. ed. 2006) ("Private school students on average experienced less fighting, cheating, disruptive student behavior, property destruction, racial conflict, truancy and absenteeism.").

7. *See also* Brief of the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondents at 25, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, __ U.S. __, 126 S. Ct. 2351 (2006) (No. 05-908), 2006 WL 2927075) ("[O]ffering students some opportunity to choose the school they would like to attend . . . serves the purpose not only of encouraging integration through the voluntary movement of students, but also of providing students with a variety of distinct yet basically equal educational opportunities to suit their needs."). While the NAACP made this assertion in a case involving public school choice, the point applies with equal or greater force in a case involving both public and private educational opportunities.

parents to exercise an informed school choice that might enable their children to realize these benefits and thus improve the educational outcomes for these students.[8]

Further still, the Recruiting Rule operates to the particular detriment of disadvantaged and at-risk students. While low-income and minority families are already disproportionately disadvantaged by underperforming public schools (and are most likely to have interest in educational alternatives such as private schools), *see Zelman*, 536 U.S. at 681-83 & n.7 (2002) (Thomas, J., concurring), they also are least likely to have access to alternative sources of information beyond direct communications from private schools.[9] Eliminating such contact

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8. *See* Brief of Caucus for Structural Equity as Amicus Curiae in Support of Respondents at 23, *Parents Involved in Cmty. Schs.*, 126 S. Ct. 2351, 2006 WL 2882691 ("Research has found that the poverty of a school, far more than the poverty status of individual students, determines educational outcomes, and that impoverished students do better when they live in middle-class neighborhoods and/or attend more affluent schools.").

9. Low-income and minority children, low-income households, households with low educational achievement, and minority households are significantly less likely to have access to the Internet, to have high-speed Internet access in the home, and to read a daily newspaper. *See* U.S. Census Bureau, *Statistical Abstract of the United States*, *Table 1112-Multimedia Audiences-Summary: 2005* (2007), *available at* http://www.census.gov/compendia/statab/tables/07s1112.xls; *Table 1138-Adult Computer and Adult Internet Users by Selected Characteristics: 1995 to 2005* (2007), *available at* http://www.census .gov/compendia/statab/tables/07s1138.xls; Susannah Fox & Gretchen Livingston, Pew Research Center, *Latinos Online: Hispanics With Lower Levels of Education and English Proficiency Remain Largely Disconnected From the Internet* (2007), *available at* http://www.pew internet.org/pdfs/latinos_online_march_14_2007.pdf; Matthew DeBell & Chris Chapman, U.S. Department of Education, Institute of Education Sciences, *Computer and Internet Use by Students in 2003* 6-13 (2006), *available at* http://nces.ed.gov/pubs2006/2006065.pdf; Henry J. Kaiser Family Foundation, *Children, The Digital Divide, And Federal Policy* 1, 2, 11 (2004), *available at* http://www.kff.org/entmedia/upload/Children-The-Digital-Divide-And-Federal-Policy-Issue-Brief.pdf.

as an option further reduces their potential avenues of obtaining information. For this reason, they are not only less likely to find out about educational alternatives, but also less likely to obtain information about scholarships for which their children may be eligible. The Recruiting Rule handicaps disadvantaged students who might otherwise be able to take advantage of the improved academic environment at a private school.[10]

C. Competitive Equity in High School Athletics Is Not a Government Interest Worth Vindicating Under Any Standard.

TSSAA's argument that "fostering a level playing field among its participating schools," Pet'r Br. 6, 34, is an important government interest should be rejected. This Court has never found that promoting "competitive equity"—as Petitioner refers to it—in high school athletics is a substantial government interest, and it should not do so now. TSSAA itself admits that "competitive equity in high school sports is not usually a

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10. Students—particularly minority and low-income students—who transfer from public to private schools because of vouchers and other school choice programs have shown increased academic performance. *See, e.g.*, Greene, Education Myths, *supra* note 6 at 150-54; Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10.2 Swedish Econ. Pol'y Rev. 11, 46-50, 65 (2004); Tom Loveless, Brookings Institution, *The 2001 Brown Center Report on American Education: How Well Are Students Learning?* 36 (2001), *available at* http://www.brookings.edu/gs/brown/bc_report/2001/body.pdf; Howell & Peterson, *supra* note 6 at 146-48, 185-87. Researchers at the nation's leading education school, Columbia Teachers College, have also concluded that competition in education improves educational outcomes such as test scores and graduation rates for students in public schools. Clive R. Belfield & Henry M. Levin, National Center for the Study of Privatization in Education, Teachers College, Columbia University, *The Effects of Competition on Educational Outcomes: A Review of U.S. Evidence* (March 2002), *available at* http://eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000 000b/80/0d/d9/54.pdf.

significant preoccupation of state governments." Petition for Writ of Certiorari 23 (Sept. 25, 2006).

Nevertheless, as evidence that competitive equity in high school athletics is a substantial government interest, TSSAA offers testimony that the absence of competitive equity can produce "resentment," "hard feelings," or the perception "that the deck is unfairly stacked against them." Pet'r Br. 34, 36. The purpose of interscholastic athletics is not to ensure that the best players are evenly divided among the different schools. Athletic competition at the secondary school level—unlike intercollegiate and professional athletics—is supposed to teach larger lessons. *See, e.g.*, Brief of Amicus Curiae of National Federation of State High School Associations in Support of Petitioner 3 (Feb. 20, 2007) ("NFHS views cocurricular activities, including athletics, as an integral part of the high school experience"); *id.* at 5 ("athletics are an extension of the classroom"). As the Sixth Circuit correctly noted, "[s]tate actors may act out of a variety of interests, but only some are substantial." *Brentwood*, 442 F.3d at 427. While promoting "competitive equity" might make interscholastic athletics more pleasant for some participants, it is hardly a core educational purpose that deserves to be elevated to the level of a substantial governmental interest.

As TSSAA revealingly points out, "competitive equity is vital to *interscholastic sports*"—not the primary goal of education. Pet'r Br. 35 (emphasis added). The two should not be confused. Athletic parity is not part of the educational mission of the State. Indeed, TSSAA's own constitution "[r]ecogniz[es] that the primary objective of all secondary schools is to educate youth." JA 134. Thus, when the purported interests of interscholastic athletics conflict with the State's educational charge, the former must give way. Competitive equity is neither essential nor important to the key goal of educating youth.[11]

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11. Likening the Recruiting Rule to a "rule that a coach too vigorously protesting a referee's call will be ejected," Pet'r Br. 1, reflects a sweeping assertion of TSSAA's power to curtail private speech. (Cont'd)

Promoting "competitive equity" appears to reflect an interest of the public school *establishment*—public school administrators, coaches, alumni, and athletic boosters who want to restrict informed choice to achieve a competitive advantage in the marketplace for secondary education. As the district court noted, "Board of Control member Morris Rogers . . . testified in deposition that a purpose of the Recruiting Rule was to protect schools and coaches from other schools taking their students." *Brentwood*, 304 F. Supp. 2d at 994 n.7. Promoting the narrow agenda of public school officials and coaches is clearly not a proper government interest, as it has no relevance to the educational mission of the public school system.

This stated interest in competitive equity also undermines the valid goal of protecting children and their families from undue influence and other interests that TSSAA claims the Recruiting Rule vindicates, such as "ensuring that athletics remain secondary to academics." Pet'r Br. 6. Competitive equity undermines these objectives by subordinating the potential academic benefits of individual students who transfer away from underperforming public schools to the interest of competitive equity in high school athletic competition. *Brentwood*, 304 F. Supp. 2d at 994 ("The substantial governmental interest in informed school choice trumps any governmental interest in controlling which schools or teams win athletic contests. Academics are more important than athletics.").

The stated interest in competitive equity also undermines the interest in "preventing the exploitation of children." Pet'r Br. 6. Competitive equity results in students being kept in underperforming schools merely because of their potential for

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(Cont'd)

Extending the notion of competitive equity in athletic competition beyond ensuring fairness on the playing field itself can quickly lead to absurd results. *See* Casey McNerthney, *Proposed New Rules for Sports Events Mean That Soon Fans Might Not Be Able to Say . . . Boo!*, Seattle Post-Intelligencer, Mar. 3, 2007, at A1 (reporting that the Washington Interscholastic Activities Association "is considering rules for fans that could ban booing").

athletic achievement and not because it is in their best interest—as either a student or an athlete. Promoting "competitive equity" treats students not as individuals with unique academic needs, but as impersonal units of athletic talent to be divided evenly across the schooling system without regard for their educational goals and interests, in effect treating our children as "mere creature[s] of the State." *Pierce*, 268 U.S. at 535.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Sixth Circuit.

Respectfully submitted,

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